No. 84-761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DATA GENERAL CORPORATION,

Petitioner,

vs.

DIGIDYNE CORPORATION and FAIRCHILD CAMERA AND INSTRUMENT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI (RESPONDING TO BRIEF FOR THE UNITED STATES)

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June 3, 1985

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Argument

The brief for the United States (the "Gov't Br.") — supporting the petition but acknowledging [at 18] that this case "is not an ideal candidate for certiorari" and stating [at 6] that "[o]ur conclusion is not unequivocal" — is flawed by unfortunate misunderstandings of the facts of this case and the record proof, leading to a misreading and unwarranted criticism of the opinion of the court of appeals.

1. ***The Facts.*** The Gov't Br. evinces a lack of knowledge or misunderstanding of the record in this case in fundamental ways. Thus:

(a) The Gov't Br. states [at 16 n.16] that vendors developed their application software "to be easily convertible to other operating systems," citing the district court's *j.n.o.v.* opinion [529 F. Supp. at 814]. However, the district court's opinion relied entirely on the testimony of a Data General OEM, John B. Trevor, III, and the thrust of Mr. Trevor's testimony was exactly contrary to the district court's assertion. [RT 1613-14, 1616, 1671-74][1] In fact, notwithstanding petitioner's claim to the contrary, the evidence was clear that there were not any meaningful conversion aids. [RT 4008-10 ("[w]e have no such tools"), 3917, 7437, 837]

The record overflows with qualified testimony that conversion to another operating system was "impractical" [RT 1804-06], "not feasible" [RT 2602-03, 7443] or "impossible" [RT 7348-49, 1613-14]. Indeed, the point was conceded even by petitioner's Vice-President in Charge of Marketing. [RT 1969; see 734 F.2d at 1342 n.4] An industry expert

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[1] Mr. Trevor had written some application programs in a way which coincidentally had proven to be of assistance in converting from one Data General operating system (RDOS) to another Data General operating system (AOS). [RT 1673-74] Mr. Trevor pointed out that, while the particular programming technique he utilized made that one conversion easier, "that wouldn't mean that all conversions would be easier. Just happened to be the conversion to an AOS was made easier because AOS was in some ways compatible with Data General's philosophy of system calls." [RT 1674]

confirmed: "Generally . . . OEMs won't consider trying to change operating systems, because they can lose years of time and billions of invested dollars in something that already works." [RT 724]

(b) The Gov't Br. also states [at 16 n.16] that "[v]endors could, and did, develop their applications software to run on more than one type of instruction set." That is an entirely false notion which was thoroughly discredited at the trial. [*E.g.*, RT 7179-81 (Dr. Robert McClure, a leading industry expert, testified that petitioner's assertion was "false" and "doesn't conform to the way people do business")]

(c) The Gov't Br. suggests and assumes [at 16-17] that petitioner's OEM customers, when they initially began writing application programs to run with petitioner's operating system software, could foresee the extent of the lock-in which would eventually result and the adverse consequences thereof. The evidence, however, is that petitioner's OEMs did not foresee that they would be locked-in to the continued use of petitioner's software. [*E.g.*, RT 1658, *quoted in* Brief for Respondents in Opposition to Petition for a Writ of Certiorari ("Resp. Br.") at 9 n.13; RT 2353] The evidence also shows that there were good reasons why they could not foresee what would occur. Among other unknown factors, customers could not have anticipated petitioner's practice to deliberately create features which "could lock people in." [RT 2576-77; see Resp. Br. at 2 n.3] Nor could they reasonably foresee that, in an industry in which innovation and change was so rapid in the development of new hardware (with a life cycle of 24 to 36 months), software would have a life of "10, 15, or more years" [Ex. 146, at 9], in effect, "forever" [RT 3532-34], "transferred from one hardware generation to another" [Ex. 150].[2] And, even after adoption of petitioner's form of license agreement confining use to "designated equipment," customers had no reason to suppose that petitioner would, if and when competing products

[2] The Gov't Br. [at 16] ironically asserts that a customer "could reasonably forsee . . . obsolescence of the software due to new technology" — precisely the opposite of what in fact occurred.

were developed, refuse to license petitioner's software for use with those competing products. In a sworn affidavit dated November 11, 1971, petitioner's President declared:

> "[It is suggested] that we 'tie-in' our sales of computers with licenses of our software. Nothing could be further from the truth. While we do supply software under a non-exclusive license on a 'bundled' basis to purchasers of our computers, we also license the software, for a license fee, to others than purchasers of our computers."

[RT 4719] Given that proclamation, it was not unreasonable for petitioner's customers to assume that petitioner would license its software in the same way that IBM and others licensed their software. [See RT 3290-92][3]

(d) The Gov't Br. states [at 17 n.20] that "if, as the district court found . . . , Data General did not discriminate in price between new and existing customers, it would have to price its product attractively to locked-in customers, or forgo sales to new customers," thus suggesting that there was not such discrimination. In fact, however, the record shows that there *was* such discrimination. [See, *e.g.*, Resp. Br. at 4 n.7] Moreover, the evidence showed that petitioner *did* forego sales to new customers in order to exploit its locked-in customers. [Resp. Br. at 3-5] As explained by Professor Schmalensee, petitioner took its "ability to charge higher prices, or to impose burdensome terms, into account in its pricing," sacrificing potential sales to new customers

[3] The Gov't Br. sidesteps the point [at 17 n.19] by stating that "anyone making an initial purchase in the relevant period [*after* 1977] could have been alerted to the risks of lock-in." However, by 1977 the bulk of petitioner's customers had already become dependent on petitioner's software. [*Cf.* Ex. 3011f, *reprinted in* Resp. Br. at 8a] Moreover, respondents by that time had invested millions of dollars and completed development of their NOVA instruction set computers.

in order to exact the higher prices obtainable from old customers. [RT 3523; see also RT 3523-26 (citing evidence of discrimination against old customers)][4]

(e) The Gov't Br. states [at 11 n.11, 13] that "[t]he district court also relied on evidence that Data General's competitors could develop the necessary software to accompany their NOVA CPUs . . . or could procure compatible software from third-party suppliers" and that the court of appeals "disregarded the evidence on which the district court relied (*e.g.*, proof that compatible and comparable systems were in fact available)." In fact, substantial and persuasive evidence contradicted the district court's statement which the court of appeals noted both explicitly and implicitly. The evidence showed that it was entirely impractical for a competitor to produce software comparable to petitioner's software on a timely basis.[5] The court of appeals did note that "the availability of 'comparable' or 'functionally equivalent' operating systems would not have freed 'locked-in' OEMS of the pressure . . . that compelled them to accede to defendant's condition that they purchase defendant's NOVA CPU in order to obtain RDOS" [734 F.2d at 1346]; but it also recognized the technical and legal impediments to and difficulties of creating "comparable" software. Thus, the court of appeals observed that "[o]ne of defendant's officers admitted it would be impossible to develop operating system software performing all the functions of defendant's RDOS without violating defendant's

[4] The speculation in the Gov't Br. [at 18 n.20] that it "is not surprising" that petitioner's sales were eventually limited to "old" customers because new customers were purchasing newer products evidently is based on the uninformed assumption that Ex. 3011f calculates sales only of old products. [See Resp. Br. at 8a] In fact, it includes sales of both new and old NOVA products.

[5] *E.g.*, RT 2478 (William Foster, petitioner's Director of Software: "If someone were to try to catch up with all the software [of] the Data General computer line, that would be a very large effort to do so. It's unlikely they would ever catch up").

copyright and utilizing its trade secrets." [*Id.* at 1342 n.3][6] It also noted that "[e]xperts, customers and even competitors testified to [the] many advantages [of petitioner's software] over competitive products." [*Id.* at 1341][7]

2. ***The Opinion of the Court of Appeals.*** Based on such misunderstandings of the record, the Gov't Br. criticizes the opinion of the court of appeals on three grounds:

(a) The Gov't Br. [at 6] reads the opinion of the court of appeals as stating "that it need not consider evidence of petitioner's power in the relevant market before condemning the tie-in [in this case]." But it is precisely such evidence which the court considered within the parameters of *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551 (1984).[8]

The court of appeals did hold that proof of substantial power was not required "over the whole market for the tying product" or "the entire market for the tied product" [734 F.2d at 1341], but it did so in light of specific well-supported jury findings of submarkets [see Resp. Br. at 7-8] in which the market power of petitioner was indisputable, making a

[6] It was established beyond the point of fair dispute that it was impossible for a competitor to develop an operating system which locked-in customers could have substituted for petitioner's software (referred to in the court of appeals opinion as "RDOS-compatible" software). The factual dispute at the trial related primarily to whether or not it was feasible to produce comparable software which might have presented a timely challenge to the dominant position of petitioner's software in appealing to new customers for NOVA instruction set computers (i.e., "NOVA (hardware)-compatible" software).

[7] The record includes comparisons of petitioner's software with software available in the NOVA-compatible submarket [*e.g.*, Ex. 3015] and with software available to run with computers which did not utilize the NOVA instruction set [*e.g.*, RT 3907-09].

[8] It also should be noted that, since the "direct evidence" at trial was "more than sufficient to support the conclusion that Data General has power over price" [RT 3538-40], current economic instruction teaches that a market definition exercise was neither required nor appropriate in this case (and would not be even if proof of a monopoly position were required). See Schmalensee, *Another Look at Market Power*, 95 Harv. L. Rev. 1789, 1798-99 (1982).

further inquiry of market power in larger markets superfluous.[9] The submarkets defined by the jury were not only in accord with the evidence in this case, they also comported with the theoretical submarket defined in the U.S. Dep't of Justice Merger Guidelines [see Resp. Br. at 13 n.16]. *Cf.* Gov't Br. at 17 n.20, conceding that "locked-in customers might appear to comprise such a relevant market."[10] Thus, the decision of the court of appeals affirming the jury findings of petitioner's market power is well within even the most rigid and demanding view of market power in Sherman Antitrust Act § 2 and Clayton Act § 7 cases and clearly within the guidelines for demonstrating market power in tie-in cases set out in *Jefferson Parish*.

Nor may the court of appeals be taxed for holding that it was sufficient to prove forcing of unwanted tied products on "an appreciable number of buyers."[11] Again that holding is entirely justified by the jury's verdict (finding sufficient economic power "appreciably to have restrained competition within the market for the tied product"), buttressed by the jury's specific findings of economic power and "appreciable restraint" [CR 3725], and what this Court said in *Jefferson Parish*, 104 S. Ct. at 1559-61.

(b) The Gov't Br. asserts [at 13 n.12] that "[t]he court of appeals disagreed with the district court's analysis of copyright law, but did not explain the basis for its disagreement." To the contrary, the basis of the entirely correct ruling by the court of appeals concerning petitioner's copyright claims was explicitly declared: The district court had erroneously ruled that computer software written in

[9] As noted in the Gov't Br. [at 5], the court of appeals also took note of certain evidence of market power in the larger markets defined by the jury. [See also Resp. Br. at 7 n.10]

[10] Data General's reply brief is in error in claiming [at 7] that "the market the jury and the Ninth Circuit defined amounts to a 'market' defined in terms based on Data General's products only . . . ." See the listing of companies in the defined tying and tied markets in Exs. 2040 and 2041, reproduced in the Appendix hereto.

[11] It is clear that, although the court in one passage used the term "some buyers," it was referring to the "appreciable number of buyers" who were impacted by petitioner's tie in this case. [734 F.2d at 1341]

source code was not copyrightable, citing the later discredited decision of *Data Cash Systems v. JS&A Group*, 480 F. Supp. 1063 (N.D. Ill. 1979), *aff'd on other grounds*, 628 F.2d 1038 (7th Cir. 1980). The court of appeals pointed out that "[t]he premise of [the district court's] position was laid to rest in *Apple Computer, Inc. v. Formula Int'l., Inc.*, 725 F.2d 521 (9th Cir. 1984); and *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1249-54 (3d Cir. 1983), decided after the district court's opinion in this case was filed." [734 F.2d at 1344 n.5] Thus, the court of appeals ruled that the district court erred in disregarding the substantial evidence presented at trial demonstrating the competitive impact of petitioner's aggressive assertion of copyright and trade secret claims (which were entirely ignored by the district court and by petitioner) to supplement the substantial technical barriers which existed to the creation of software to compete with petitioner's software and to "protect its competitive position." [Ex. 136; RT 2224-25]

The court of appeals also pointed out that the district court had not only ignored the substantial evidence presented by respondents but, in addition, it had "erroneously imposed the burden of proof on plaintiffs." [734 F.2d at 1344] That statement was entirely warranted in the circumstances presented (with respondents' proof concerning the economic impact of petitioner's copyright and trade secret claims virtually unchallenged). The reference to a presumption of economic power as a result of petitioner's copyright claims, shifting the burden of proof to petitioner, was and is entirely in accord with the prior opinions of this Court [see *Jefferson Parish*, 104 S. Ct. at 1560-61], and no good reason has been advanced for revisiting the subject in this case — especially since respondents did not rely on any presumption but proved market power by every available avenue of proof.[12]

[12] The citation of *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), as an inconsistent holding is incorrect. *Walker Process* was a pure section 2 case, not involving any tie-in, which held that "the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided

(c) The Gov't Br.'s final criticism of the opinion of the court of appeals is founded on the contention that petitioner's market power must be judged only at the time when customers first chose to use petitioner's software (thus, apparently on a customer-by-customer basis). As noted above, the factual basis for that contention — that petitioner's customers "should have been aware of the risks of lock-in" [Gov't Br. at 17] — is faulty (and, after full presentation and consideration, presumably was rejected by the jury), destroying the argument. This is not a case which can be properly analogized to a patient selecting a hospital or a manufacturer locating near a steel mill or entering into a fixed-term supply contract; none of those hypothetical cases involves the kind and degree of economic power accruing to petitioner in this case without any voluntary grant of such power by customers, and none of them posits a tying arrangement for the exploitation of that power by the sale of unwanted products. In contrast to the Government's attempted analogies, this is a case in which a significant body of customers inadvertently became dependent on continued use of petitioner's unique and highly complex product which could not be duplicated and for which there was not any reasonable substitute, with substantial evidence also indicating that petitioner deliberately misled those customers into that position of involuntary dependency. In this case, it truly would be a "departure from commercial and economic reality" to ignore (as the Gov't Br. suggests) all evidence of the dependency of petitioner's customers on the continued use of its software, a central fact in understanding the way in which petitioner chose to conduct its business.

Moreover, the contention (at least as attempted to be applied in this case) is in any event wrong as a matter of law.

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the other elements necessary to a § 2 case are present," including proof of "the relevant market for the product involved." *Id.* at 174, 177. The decision is irrelevant to the questions presented in a section 1 tie-in case, as revealed by the tie-in decisions by this Court both before and after *Walker Process*.

First, the rationale of the laws condemning anticompetitive tying arrangements emphasizes (in terms apposite to this case) that "the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market." *Jefferson Parish*, 104 S. Ct. at 1559 n.19 (quoting from Justice White's dissenting opinion in *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 512-14 (1969)). Self-evidently, such a foreclosure of competition may occur as much (or more) after the time when any customer or all customers have had their first dealings with the tying seller as before that time. Competition requires protection as much at the later time as at the earlier time (particularly so where potential buyers have been involuntarily made dependent on the tying seller's product).

Second, the contention depends on an underlying argument that "[s]ellers might exploit that lock-in through a tie-in, or simply by charging higher prices for the software alone. From the customer's point of view, it would make little difference which form the 'exploitation' might take." [Gov't Br. at 16 n.18] That argument is wrong because the choice between paying a higher price for a *wanted* product and being compelled to take a second *unwanted* product can make a great deal of difference to many customers. Being forcibly precluded from using a wanted product with a second wanted product can make an even greater difference, forcing a degradation of quality in the totality of the products combined by the purchaser.[13] The *Jefferson Parish* decision provided a definitive answer to the Government's contention:

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[13] In this case, for example, many customers preferred to purchase respondents' CPU products instead of petitioner's because of the superiority of respondents' products; because they wished to maintain alternative sources of supply to assure on-time deliveries and avoid adverse discrimination in the delivery of products; and because they found dealing with petitioner to be oppressive in other ways. [*E.g.*, RT 5049-50, 1225, 1629-30, 1105; *cf.* RT 957, 1640-42, 1828, 7440-41]

> "[T]he law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other. . . . [I]f that power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures. This impairment could either harm existing competitors or create barriers to entry of new competitors in the market for the tied product . . . ."

104 S. Ct. at 1559 (footnote and citation omitted).

Conclusion

The Gov't Br. concedes [at 18] that "the case is not an ideal candidate for certiorari" in part because "we cannot say that a properly instructed jury could not, as a matter of law, have returned a verdict in favor of respondents." That conclusion is indeed required because the jury was properly instructed and the proof fully supports the ruling of the court of appeals in setting aside the *j.n.o.v.* by the district court — the ruling which must serve as the ultimate reference point in any review of the decision below. Thus, there is no occasion to review the decision below and the petition for a writ of certiorari should be denied.

June 3, 1985

Respectfully submitted,

Jack E. Brown
Counsel of Record for Respondents

APPENDIX

Exhibit 2040

Number of Installations of various Software Systems

System Software	Company	Date	Number of Software Systems Installed	Percent
NOVA Software	Data General	3/80	41,248	82.400
BLIS/COBOL	IPI	10/80	900	1.800
IRIS	Point 4	9/80	6,000	12.000
MICOS	Minicomputer Systems	9/80	1,800	3.600
BITS	Dynamic Concepts	9/80	60	.100
IOS	Izhar Shy	6/80	15	.020
VMOS	RMD Assoc.	6/80	30	.050
REX	Fairchild	4/81	1	.002
!MDOS	Fairchild	12/79	5	.009
		Total	50,059	100.000

Exhibit 2041

Number of various NOVA Instruction Set machines installed

Company	Date	No. CPUs Installed Base	Percent Market Share
Data General (NOVAs)	3/80	58,925	84.7
Bytronix	12/78	300	4
Digidyne	8/80	2,000	2.9
Fairchild	2/81	965	1.4
SCI	6/80	400	.6
Ampex	12/78	300	4
Keronix	12/78	1,700	2.4
DCC	5/75	4,000	5.8
Point 4	9/80	1,000	1.4
	Total	69,590	100.0

Certificate of Service

The undersigned counsel of record for Respondents certifies that he is a member of the Bar of this Court and that, on June 3, 1985, three copies of the Supplemental Brief for Respondents in Opposition to Petition for a Writ of Certiorari (Responding to Brief for the United States) were served by first-class mail, postage prepaid in Phoenix, Arizona, addressed as follows:

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